UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: WORLD TRADE CENTER DISASTER SITE LITIGATION	21 MC 100 (AKH)
IN RE: WORLD TRADE CENTER LOWER MANHATTAN DISASTER SITE LITIGATION	21 MC 102 (AKH)
IN RE: COMBINED WORLD TRADE CENTER AND LOWER MANHATTAN DISASTER SITE LITIGATION (straddler plaintiffs)	21 MC 103 (AKH)
THIS DOCUMENT APPLIES TO ALL WORLD TRADE CENTER DISASTER SITE LITIGATION	

MEMORANDUM IN SUPPORT OF MOTION ON SHORT NOTICE FOR STAY PENDING APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

PRELIMINARY STATEMENT

On March 11, 2010, Plaintiffs' Counsel, Worby, Groner, Edelman & Napoli, Bern LLP (the "Worby Firm") and Sullivan Papain Block McGrath & Cannavo P.C. (the "Sullivan Firm"), counsel for Defendants the City of New York and its Contractors (collectively, the "Settling Defendants"),[1] Patton Boggs, LLP, and counsel for the WTC Captive Insurance Company, Inc. (the "WTC Captive"), McDermott Will & Emery, executed the World Trade Center Litigation Settlement Process Agreement ("Settlement Agreement")—a comprehensive document establishing a pathway by which more than 10,000 plaintiffs in the WTC Litigation[2] can settle their claims. The Settlement Agreement does not contemplate the Court taking *any* role in approving, rejecting, or otherwise modifying its terms. Nonetheless, the Court has made clear on several occasions that the Court will work to thwart the settlement process unless significant changes demanded by the Court are made to the Settlement Agreement.

The Settling Defendants respectfully submit that this Court lacks the legal authority to interfere with their private agreement and have filed a notice of appeal[3] covering three of the Court's Orders concerning the Settlement Agreement, specifically: (1) the March 15, 2010 Order prohibiting them from complying with the Settlement Agreement; (2) the March 23, 2010 Order extending the Settlement Agreement deadline for submission of the "Eligible Plaintiff List;" and (3) the April 9, 2010 Order setting a purported "fairness hearing" regarding the Settlement

[1] The Contractors represented by Patton Boggs LLP are set forth in Addendum A to the notice of motion.

[2] As used herein, the term "WTC Litigation" refers to all suits in the 21 MC 100, 21 MC 102, and 21 MC 103 Master Dockets.

[3] The notice of appeal was filed on behalf of Defendants the City of New York, AMEC Construction Management, Inc., AMEC Earth & Environmental, Inc., Bovis Lend Lease LMB, Inc., Evergreen Recycling of Corona (E.R.O.C.), Plaza Construction Corp., Tully Construction Co., Inc., Turner Construction Company, and Turner/Plaza, A Joint Venture.

Agreement. A motion seeking expedited review of this appeal will soon be filed with the United States Court of Appeals for the Second Circuit.

The Settling Defendants' decision to seek review of the Court's assertion of authority over the Settlement Agreement has not been reached lightly. However, the Settling Defendants strongly believe that their intense, detailed and good faith negotiations with Plaintiffs' Counsel have resulted in a fair, efficient process to provide just compensation to individual plaintiffs and that this process should proceed without further judicial intervention. The filing of the notice of appeal on April 14, 2010 had the effect of divesting the Court of jurisdiction to further attempt to affect the settlement process pending resolution of the Settling Defendants' appeal. Moreover, and irrespective of the Court's views on divestment of jurisdiction, the Settling Defendants hereby move for an immediate stay of all further proceedings in the WTC Litigation pending resolution of their appeal by the United States Court of Appeals for the Second Circuit.[4]

STANDARD FOR MOTION TO STAY

Four factors must be considered in determining whether to grant a stay pending appeal: "(1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected. *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993) (citations and quotations omitted); *see also McCue v. City of New York* (*In re World Trade Ctr. Disaster Site Litig.*), 503 F.3d 167, 170 (2d Cir. 2007). These criteria are treated "somewhat like a sliding

[4] The Settling Defendants recognize that the Court previously established an "informal, interim stay" regarding the 21 MC 100, 102 and 103 Master Dockets. However, the Court recently granted a motion made by a defendant in the 21 MC 102 Master Docket to lift the stay in that docket as to that defendant and the Court invited other defendants to submit their own motions seeking to lift the stay as to those defendants. As a result, the Settling Defendants are compelled to bring this motion at this time.

scale" and the Second Circuit has noted that "more of one excuses less of the other." *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006).

ARGUMENT

The Settlement Agreement is the culmination of twenty-two months of difficult and hard-fought arms-length negotiations. It provides a process to settle the vast majority of cases in one of the most complex mass tort litigations in American history. Counsel for the parties to the Settlement Agreement have established an efficient procedure to provide fair and just compensation to deserving plaintiffs. The Settlement Agreement is not conditioned upon judicial approval and no such approval is needed. The Settlement Agreement is not one of the few types of private settlement agreements that is subject to court approval. Substantial legal research has not identified *any* legitimate basis upon which the Court may assert authority to approve or reject the Settlement Agreement. Indeed, legal research suggests that the Court's efforts to be involved in the settlement process—including the decision to hold a "fairness hearing" on the Settlement Agreement—is unprecedented. The Settling Defendants are confident that an appellate panel will agree that there is no legal basis for the Court to hold a "fairness hearing" or to attempt to approve, reject, or modify the terms of the Settlement Agreement.

It is well settled that "the filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *see also Tancredi v. Metro. Life Ins. Co.*, 378 F.3d 220, 225 (2d Cir 2004). Thus, the Court now lacks jurisdiction to assert any authority over the settlement process pending resolution of the Settling Defendants' appeal, including, but not limited to, proceeding with the "fairness hearing" scheduled for April 27, 2010. *See, e.g.*, 20 Fed. Pract. & Proc. Deskbook § 109 (noting that

review of an interlocutory order "quite properly extends to all matters inextricably bound up with the remedial decision"). Regardless, a stay pending appeal of all further proceedings in the WTC Litigation is warranted under the circumstances.

Plaintiffs who wish to participate in the settlement process must be given the opportunity to do so free from Court interference or influence. The Settling Defendants are deeply troubled about the effect that further judicial interference may have on the ability of individual plaintiffs to consult with their lawyers, make their own decisions, and may have on the ability of counsel for the Settling Defendants to *ever* bring the WTC Litigation to a just conclusion. This Court already has made a number of public statements that appear calculated to make it extremely difficult, if not impossible, for Plaintiffs' counsel to communicate fairly with their clients and to reach the requisite level of participation in the Settlement Agreement. Further statements by the Court condemning the Settlement Agreement undoubtedly will only exacerbate the already significant prejudice to the Settling Defendants. Accordingly, both the Settling Defendants' substantial possibility of success on appeal and the dangers of irreparable harm weigh strongly in favor of granting a stay pending an expedited appeal.

The other, non-settling, parties to the WTC Litigation will not be substantially harmed if the Court orders a stay pending an expedited appeal. In fact, the other parties may also be harmed if a stay is *not* granted. Together, the Worby and Sullivan Firms represent approximately 98% of Plaintiffs in the 21 MC 100 master docket, 86% of Plaintiffs in the 21 MC 102 master docket, and 98% of Plaintiffs in the 21 MC 103 master docket. Moreover, the Settling Defendants are named in approximately 100% of the cases in the 21 MC 100 master docket, 13% of the cases in the 21 MC 102 master docket, and 99% of the cases in the 21 MC 103 docket. A significant amount of time and money will be wasted on discovery—by *all*

parties to the WTC Litigation—if this Court does not immediately enter the stay requested herein. For example, if discovery is permitted to proceed in the 21 MC 102 Master Docket without the parties to the Settlement Agreement, as the Court suggested it might at the April 12, 2010 Status Conference, and the Settlement Agreement's minimum ninety-five percent settlement opt-in is not ultimately achieved, depositions will almost certainly need to be reopened to allow the parties to the Settlement Agreement the opportunity to obtain the discovery they need to prosecute or defend their cases. Furthermore, any requirement by the Court that discovery (and potentially trial) proceed in the 21 MC 100 and 21 MC 103 Master Dockets would compel the parties to the Settlement Agreement (notwithstanding their executed Settlement Agreement) to litigate and proceed to trial against their will. Thus, any harm to the non-settling parties caused by a slight delay in discovery is substantially outweighed by the significant harm to all parties that will result if a stay is not granted. In addition, the non-settling parties will benefit from guidance by the Second Circuit regarding whether the Court has the authority to approve of private settlement agreements in the WTC litigation.

The public interest also weighs in favor of granting a stay of proceedings pending appeal. Allowing discovery to continue during the pendency of the Settling Defendants' appeal will necessarily result in the unfortunate consequence of significant defense costs. Moreover, proceeding with the "fairness hearing" currently scheduled for April 27, 2010 likely will make it even more difficult to obtain the level of participation in the Settlement Agreement as it will engender even more confusion and uncertainty regarding the status of the agreement, the direct result of which would also be the need to spend even more money on defense costs. As the insurance policy of the WTC Captive ultimately will be used to settle Plaintiffs' claims and/or

satisfy judgments entered against the City and its Contractors, there is a strong public interest in not needlessly depleting that policy.

CONCLUSION

For all of the foregoing reasons, the Settling Defendants respectfully request that the Court grant their motion on short notice for a stay of all proceedings in the WTC Litigation pending their expedited appeal.

Dated: April 15, 2010

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